congressional intent to "assure that administrative exhaustion will be required," *i.e.*, by "prevent[ing] review of decisions of the Secretary save as provided in the Act, which provision is made in § 405(g)." *Salfi*, 422 U.S. at 757; see 42 U.S.C. 1395ff(b) (incorporating Section 405 for Medicare Part B claims). Section 405(g) in turn provides for judicial review of agency action in suits brought *against* the Secretary, 42 U.S.C. 405(g), and therefore contains no expression of congressional intent to govern (much less to preclude) actions brought by the United States.

The court of appeals also correctly held that the instant action for restitution of Medicare overpayments is not a proceeding to review final agency action as contemplated by the second sentence of Section 405(h). Pet. App. 16a. The government in this case is plaintiff, and its complaint does not place before the court an administrative record or administrative decisionmaking rationale to review. Rather, this suit is instead an action to establish *de novo* the government's right to obtain restitution of Medicare funds wrongfully paid from the Treasury.

Petitioner errs in asserting (Pet. 12-14) that the decision below creates a conflict with the decisions of other circuits on the issue of whether Section 405(h) applies to suits by the government. Indeed, the only decisions to address the issue have held, consistent with the decision below, that the Medicare Act, including Section 405(h), poses no bar to such suits. *United States* v. *Aquavella*, 615 F.2d 12, 20-21 (2d Cir. 1980) ("[S]ection 405(h) by its terms applies only to actions brought against the government and not by the government."); see *United States ex rel. Rahman* v. *Oncology Assocs., P.C.*, 198 F.3d 502, 513 (4th Cir. 1999) ("The statutes and

regulations governing the Medicare Part B program * * * do not preclude the United States from bringing an independent action in federal court to litigate claims under statutes such as the False Claims Act, 31 U.S.C. § 3729 *et seq.*, the Federal Debt Collection Procedures Act, 28 U.S.C. § 3301 *et seq.*, or related common-law claims."). By contrast, the cases relied upon by petitioner (Pet. 13-14) are not on point. They merely hold that principles of finality bar administrative law judges (ALJs) in social security proceedings from redetermining the findings of prior ALJs. *Drummond* v. *Commissioner of Soc. Sec.*, 126 F.3d 837, 842 (6th Cir. 1997); *Draper* v. *Sullivan*, 899 F.2d 1127, 1130 (11th Cir. 1990); *Lively* v. *Secretary, HHS*, 820 F.2d 1391, 1392 (4th Cir. 1987); *Leviner* v. *Richardson*, 443 F.2d 1338, 1342 (4th Cir. 1971). None of those decisions addresses the jurisdiction of courts under 28 U.S.C. 1345 to hear claims by the United States seeking restitution of monies erroneously paid from the Treasury.

b. Petitioner also argues (Pet. 8-10) that the United States' common law action for restitution is foreclosed by Medicare's statutory and regulatory provisions governing the Secretary's right to collect Medicare overpayments and that the this suit therefore violates their due process rights. Petitioner cites no appellate decision, however, adopting such a contention. Moreover, the district court's exercise of subject matter jurisdiction here does not deprive petitioner of the right to a full and fair presentation of a defense to the United States' claims, and petitioner does not argue to the contrary.

Petitioner also erroneously assumes that Medicare's administrative remedies afford the government the sole and exclusive means of recouping an overpayment. As

the court of appeals held (Pet. App. 21a-23a), there is nothing in the Medicare Act that purports to limit the United States to remedies under the Act or to displace the United States' long-established, common law remedies to sue for the recovery of monies wrongly paid from the Treasury. See, *e.g.*, *United States* v. *Texas*, 507 U.S. 529 (1993); *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 201-204 (1967); *United States* v. *Wurts*, 303 U.S. 414 (1938); *United States* v. *Bank of Metropolis*, 40 U.S. (15 Pet.) 377 (1841). And nothing in the Medicare Act expresses an intent to oust federal courts of jurisdiction under Section 1345. Pet. App. 20a-21a.

Moreover, as the court of appeals concluded (Pet. App. 21a), petitioner's contention that the Act's remedies are exclusive "does not go to subject matter jurisdiction at all" but relates to whether the United States has a cause action on the merits, and accordingly is not directly relevant to the issue of subject matter jurisdiction identified in the questions presented by the petition. Pet. i (Question 2). Petitioner's reliance on the Secretary's regulations is even further afield, since they do not speak to the jurisdiction of federal district courts over suits brought by the United States under Section 1345, which in any event requires an "Act of Congress" to displace federal court jurisdiction. 28 U.S.C. 1345; see Pet. App. 19a-20a.

2. Petitioner further argues that the court of appeals' decision not to apply the doctrine of primary jurisdiction conflicts with decisions of this Court and other courts of appeals. Pet. 14-19. That contention, too, lacks merit. The court of appeals held that petitioner's contention "was not within the scope of the certified question" on appeal, and then commented

briefly that, even if the court of appeals "arguably had some form of supplemental appellate jurisdiction to reach the question, we see no basis on which to upset the district court's order." See Pet. App. 27a. That summary treatment of the issue does not present a suitable vehicle for this Court's plenary review.

Moreover, the court of appeals correctly found that the issue was not properly before it. An interlocutory appeal under 28 U.S.C. 1292(b) confers jurisdiction over the order certified and not merely the "controlling question of law" identified by the appellant. *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996); *United States* v. *Stanley*, 483 U.S. 669, 677 (1987). The primary jurisdiction issue raised by petitioner, however, is not encompassed by the district court order at issue here. Even where applicable, the doctrine of primary jurisdiction does not compel the trial court to dismiss the complaint and terminate its jurisdiction. Rather, it specifically authorizes the trial court to *retain* jurisdiction while it refers particular matters to the pertinent agency for an expert determination. See, *e.g.*, *Reiter* v. *Cooper*, 507 U.S. 258, 268-269 (1993) (primary jurisdiction "is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. * * * Referral of the issue to the administrative agency does not deprive the court of jurisdiction").

Thus, even if primary jurisdiction principles were applicable here, they would not compel the district court to dismiss the case for lack of jurisdiction. Nor would they otherwise afford a basis for granting petitioner judgment. Accordingly, the question of whether the district court erred in not deferring to the Secretary's

alleged "primary jurisdiction" was not properly before the court of appeals on certification under 28 U.S.C. 1292(b) of the district court's order denying petitioner's request for a final judgment in its favor.

3. Petitioner finally argues that the court of appeals erred in rejecting its argument that the suit is barred by principles of exhaustion and ripeness. Pet. 19-22. As petitioner recognizes, however, the court below "did not discuss [those] issue[s] at all in its opinion." Pet. 19-20. Moreover, petitioner's contentions turn on the particular facts of this case and thus do not present any question of substantial precedential significance warranting this Court's review. And, in any event, petitioner's contentions lack merit.

The United States was not required to exhaust Medicare's administrative remedies before commencing suit. The prudential strand of the exhaustion doctrine vests a trial court with equitable discretion to determine whether to exercise subject matter jurisdiction without requiring initial administrative consideration of the claim. *McCarthy* v. *Madigan*, 503 U.S. 140, 144 (1992); *McGee* v. *United States*, 402 U.S. 479, 483 & n.6 (1971).*

Here, the district court did not abuse its discretion in deciding to exercise subject matter jurisdiction over this case. Although the Secretary's expertise may be relevant below, his expertise can be obtained through expert testimony, other evidentiary submissions, and briefing,

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* The phrase "exhaustion of remedies" may refer either to a statutory requirement that is a jurisdictional prerequisite to suit or to a discretionary, prudential consideration that does not bear directly on the court's subject matter jurisdiction. *McCarthy*, 503 U.S. at 144-146. We refer to the non-statutory, prudential strand of exhaustion doctrine here, since the statutory exhaustion requirement in Section 405 does not apply to suits brought by the government. See pp. 5-7, *supra*.

without referring the claims to the Secretary for an administrative decision. Further where the government itself is the plaintiff, as in this case, exhaustion of administrative remedies is not necessary to protect the government's administrative processes from premature judicial intervention. Pet. App. 41a-42a (district court decision).

Petitioner also errs in asserting (Pet. 20) that exhaustion was compelled by this Court's decisions in *Weinberger* v. *Salfi* and *Shalala* v. *Illinois Council on Long Term Care*, *supra*. As discussed, this Court's decisions construing Section 405(h) address claims brought against the government rather than claims brought by the United States and, in any event, address statutory exhaustion requirements imposed by the Social Security Act's jurisdictional scheme rather than prudential exhaustion.

For similar reasons, petitioner errs in asserting (Pet. 20-21) that the United States' claim is not ripe. The ripeness doctrine is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967). The government's claims here are ripe under those principles. Medicare payments have been disbursed to and received by petitioner, and the United States, after due investigation, has concluded that the payments were wrongfully paid. As such, the pertinent administrative action —payment of the claim—is complete, and there is an actual and concrete dispute over the validity of those

payments and over the government's right to restitution that is fit for judicial resolution.

Petitioner is also incorrect in arguing that the court of appeals' failure to hold the matter unripe creates a conflict in the circuits. Pet. 21. As pointed out above, the court of appeals did not discuss the issue of ripeness in its opinion so it cannot give rise to a circuit conflict. Moreover, the decisions cited by petitioner are readily distinguishable from the present case. Those decisions addressed whether a contract claim by the government, for purposes of the statute of limitations under 28 U.S.C. 2415(a), accrues on the date of an initial estimated and interim payment, the date of any audit of annual cost report submitted by the provider, or the later date of a final notice of program reimbursement that reconciles the estimated payments with the amount found by the fiscal intermediary to be owed to the provider. See, *e.g.*, *United States* v. *Hughes House Nursing Home, Inc.*, 710 F.2d 891 (1st Cir. 1983); *United States* v. *Pisani*, 646 F.2d 83 (3d Cir. 1981); *United States* v. *Gravette Manor Homes, Inc.*, 642 F.2d 231 (8th Cir. 1981); *United States* v. *Withrow*, 593 F.2d 802 (7th Cir. 1979). This case, by contrast, involves no such statute-of-limitations question. Further, nothing in the decisions cited by petitioner suggests that the Medicare Act precludes a district court from hearing actions brought by the United States under 28 U.S.C. 1345. Indeed, all of those decisions were brought by the United States, and one of the decisions notes that the government brought the action under Section 1345. *Gravette Manor Homes*, 642 F.2d at 232.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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